American Postal Workers Union, AFL–CIO, Local 551 *and* Michael Russo. Case 15–CB–4696(P)

May 17, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On June 13, 2001, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The Charging Party, Michael Russo, alleges that the Respondent Union violated its duty of fair representation by failing to adequately pursue his grievance. The grievance arose after the Employer's supervisor, Lonnie Gonzalez, failed to timely respond to Russo's inquiry regarding the requirements for inclusion on the unit's overtime desired list (ODL). As a result, Russo missed the deadline to sign the list and was precluded from working overtime for a calendar quarter. Russo filed a grievance and a step 1 meeting was held. Attending the meeting were Gonzalez, Russo, and the Respondent's representative, Volume Ali. Ali rejected the Employer's proposed settlement offering to place Russo on the list and compensate him for lost overtime. He requested that the Employer deny the grievance so he could take it to step 2.[2] The Employer denied the grievance at step 1. The Respondent did not file a step 2 appeal and the grievance was not again pursued until after Russo filed the instant charge.

The judge concluded that the Respondent refused to accept the Employer's offer to include Russo on the list and compensate him because of the Respondent's policy to allow no exceptions to the time deadlines for the ODL. The judge found no evidence of animus or discriminatory motivation for the Respondent's failure to act and concluded that Ali was under no obligation to accept the Employer's offer to put Russo on the ODL if doing so violated the Respondent's policies.

Because the Employer never offered to resolve the grievance solely through payment, the judge concluded that the Respondent did not act in an arbitrary manner in failing to follow up on an offer it would not accept. Finally, the judge found that the Respondent's subsequent grievance (erroneously referred to as a step 2 grievance) requesting only compensation for lost overtime was somewhat disingenuous, but not grounds for finding that the Respondent breached its duty of fair representation.

The General Counsel excepts to the judge's conclusion that the Respondent Union did not violate its duty of fair representation by refusing to pursue employee Russo's grievance beyond step 1. We acknowledge that some of the Respondent's actions may be open to question. In particular, although the Postal Service's offer of compensation was linked with placement on the overtime desired list (ODL), the Respondent made no attempt to pursue a settlement based on compensation without placement on the ODL. Further, although the Respondent told Russo that it would take his grievance to step 2, it did not pursue the grievance and did not inform Russo of the decision to drop the grievance.

There are, however, no exceptions to the judge's findings that the Respondent did not discriminate against Russo because he did not join the Respondent and that Respondent's policy to allow no exceptions to the time deadline for inclusion on the ODL was not arbitrary. Given these unexcepted findings and the wide discretion unions have in deciding whether to pursue grievances, we find that the Respondent's actions here did not violate the Act. See *General Motors Corp.*, 297 NLRB 31, 32 (1989); *Machinists Local 776-A (General Dynamics)*, 282 NLRB 774 (1987); *Clothing & Textile Workers Local 148T (Leshner Corp.)*, 259 NLRB 1120 (1982); and *Electrical Workers Local 1701 (Dynalectric Co)*, 252 NLRB 820 (1980). See also *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479 (2000).[3]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Under the contract between the parties, either an employee or the Union may file and present a grievance against the Employer. In the instant case, Russo filed the grievance on his own behalf and Ali was present as a representative of the Respondent to uphold the terms and conditions of the contract.

[3] *Maritime Union District 1 (Mormac Marine Transport)*, 312 NLRB 944 (1993), cited by the General Counsel, is distinguishable. In *Mormac Marine*, the Board found that a union violated its duty of fair representation when it did absolutely nothing for 9 months with respect to a grievance although requested to do so on numerous occasions. By contrast, here the Respondent fully considered the grievance. It participated in an initial grievance meeting and was fully aware of all the facts when it made a determination that the grievance should not be pursued because, in its view, it lacked merit.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Kevin McClue, Esq., for the General Counsel.
Melinda K. Holmes, Esq. (O'Donnell, Schwartz & Anderson, P.C.), of Washington, D.C., for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case beginning on May 11, 2001, in Pensacola, Florida. On May 16, 2001, I heard oral argument, and on May 18, 2001, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

The Conclusions of Law and Order provisions are set forth below.

CONCLUSIONS OF LAW

1. The Charging Party, Michael Russo, an individual, is employed by the United States Postal Service, and the Board has jurisdiction in this matter by virtue of Section 1209 of the Postal Reorganization Act.

2. The Respondent, American Postal Workers Union, AFL–CIO, Local 531, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in any unfair labor practice.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended [2]

ORDER

The complaint is dismissed.

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APPENDIX A

JUDGE LOCKE: On the record. This is a bench decision in the case of American Postal Workers Union, AFL–CIO, Local 551, which I will call the "Respondent," or "Local 551," and Michael Russo, an Individual, whom I will call the "Charging Party." The case number is 15–CB–4696(P).
This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

I find that Respondent did not violate the Act by refusing or failing to process a grievance filed by the Charging Party concerning his eligibility to work overtime. Therefore, I recommend that the Complaint be dismissed.

This case began on November 8, 1999, when the Charging Party filed his initial charge in this proceeding. On May 30, 2000, after investigation of the charge, the Regional Director of Region 15 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint."

In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Hearing opened before me on May 11, 2001 in Pensacola, Florida. On that date, the parties called witnesses, whom I observed as they testified. The parties completed their presentation of evidence on that same date. On May 16, 2001,

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counsel presented oral argument. Today, May 18, 2001, I am issuing this bench decision.

Based on the Respondent's Answer to the Complaint, as amended at hearing, I make the following findings.

The employer in this matter is the United States Postal Service, and the Board has jurisdiction by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. 151 et seq.

The Respondent, American Postal Workers Union Local 551, is an independent affiliate of the American Postal Workers Union, AFL–CIO, which I will call the "APWU" or the "Union." At all material times, the APWU has been the exclusive collective-bargaining representative of the following employees:

> All postal clerks in the regular workforce of the United States Postal Service, wherever located, that are engaged in customer services and mail processing, EXCLUDING managerial, supervisory and professional employees, and employees in the supplemental work force (as defined in Article 7 of the collective bargaining agreement).

At the Pensacola, Florida post office involved in this proceeding, Local 551 is the APWU's agent for administering the Union's collective-bargaining agreement with the Postal Service. I find that both APWU and its affiliate, Local 551, are labor organizations within the meaning of Section 2(5) of the Act. Additionally, I find that Charging Party Michael Russo, is an

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employee within the bargaining unit I have just described.

It is undisputed that the Union and the Postal Service have entered into a collective-bargaining agreement, which I will call the "contract." This contract establishes terms and conditions of employment for unit employees, including the Charging Party. Such terms include provisions relating to overtime work.

In its September 15, 2000 Amended Answer to the Complaint, Respondent admitted that "for approximately the last year, Volome Ali has held the position of Vice President of Local 551, and has therefore been, pursuant to Section 2(13) of the Act, an agent of Respondent during that time period." How-

[1] The bench decision appears in uncorrected form at pages 228 through 244 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this Certification.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ever, Respondent denied that Ali had been its agent at other material times.

The Complaint alleges that Respondent has violated Section 8(b)(1)(A) of the Act since about September 30, 1999. From the admission in Respondent's Answer, it appears that Ali became the Union's vice president on about September 15, 1999, about two weeks before the alleged unfair labor practice.

Additionally, at the May 11, 2001 hearing, Ali testified that he had been a shop steward for about 2 to 2-1/2 years. Moreover, a letter from the Respondent's president to the Pensacola postmaster indicated that Ali became shop steward on January 25, 1999, and I so find.

When dealing with management in his shop steward capacity,

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Ali clearly would be acting as Respondent's agent. Therefore, I find that at all material times, Ali has been Respondent's agent within the meaning of Section 2(13) of the Act.

Complaint paragraph 6 alleges that since about September 30, 1999, Respondent has refused and/or failed to process a grievance concerning the postal service's failure to notify the Charging Party about his eligibility to work overtime. Complaint paragraph 7 alleges that Respondent did so because the Charging Party was not a member. Respondent has denied these allegations.

Complaint paragraph 9 alleges that Respondent failed or refused to process the grievance for reasons that are unfair, arbitrary and invidious. It also alleges that Respondent "has breached the fiduciary duty it owes" to the Charging Party and the bargaining unit.

Complaint paragraph 10 alleges that Respondent thereby violated Section 8(b)(1)(A) of the Act. Respondent has also denied these allegations.

The Charging Party, Michael Russo, previously was a letter carrier. Although employed by the Postal Service, he was not then in the bargaining unit represented by the Union. Rather, he was in a separate unit represented by the National Association of Letter Carriers.

Some time in 1996, Russo suffered an injury which made him unable to drive a mail truck. The Postal Service transferred

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him to a job as a modified distribution clerk, which is a position within the bargaining unit represented by the Union.

The record suggests that, at the national level, the Union has objected to the Postal Service's practice of transferring employees into its bargaining unit from the separate bargaining unit represented by the National Association of Letter Carriers. However, the record does not indicate that the Union specifically opposed the Charging Party's transfer.

When the Charging Party transferred into the bargaining unit represented by the Union, he did not join the Union. However, under the Act, the Union has a duty to represent each employee in the bargaining unit regardless of whether that person is a Union member.

Pursuant to the collective-bargaining agreement, the Postal Service has established an "overtime desired list." On occasion, the Postal Service has assigned overtime work to employees not on the overtime desired list, resulting in the Respondent filing a grievance.

The Postal Service has settled such grievances by paying overtime to employees on the overtime desired list. These payments represent the amount of overtime pay which the listed employee would have earned had the Postal Service used the listed employee, rather than someone not on the list, to perform the overtime work.

The Postal Service makes up a new overtime desired list

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each calendar quarter. An employee who wants to be placed on the list must sign up before the quarter begins. Respondent has a policy that an employee who did not ask to be listed before the deadline cannot be placed on the list later.

No evidence indicates that Respondent ever deviated from this policy. Some time before October 1999, the Charging Party asked his supervisor a procedural question about being placed on the overtime desired list. However, the Charging Party did not specifically ask to be listed. As the parties have stipulated, the last day for signing this list was September 30, 1999.

The supervisor, Lonnie Gonzalez, intended to get back to the Charging Party with the answer to this procedural question, but Gonzalez failed to do so before October 1, 1999. Thus, the Charging Party did not place his name of the list before the deadline had passed.

It appears that Supervisor Gonzalez felt guilty about failing to get back to the Charging Party before the deadline had run. Specifically, at hearing, Gonzalez testified that he believed it to be his fault that the Charging Party had not put his name on the overtime desired list before the closing date.

What happened next may be summarized as follows: Gonzalez was willing to correct what he believed to be his mistake by placing the Charging Party's name on the list after the deadline. However, the Respondent, following its hard- and-fast deadline policy, would not allow Gonzalez to make an exception

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to the rule.

More specifically, on October 7, 1999, the Charging Party filed a grievance, which I conclude was not clearly frivolous. The grievance stated in part as follows:

> Grievant, an employee in full-time status, missed the opportunity to sign the overtime-desired list (ODL) because "Management fail to inform grievant of his ability to sign the ODL."
>
> Grievant request the ODL to be re-opened in order for grievant to be given opportunity to sign the ODL.

Although the grievance sought for the Charging Party to be placed on the list even though the deadline had passed, the grievance also suggested the possibility of an alternative remedy. Thus, on the "corrective action" portion of the grievance form, the Charging Party described the requested relief as follows:

> Grievant request ODL be opened in order for the Grievant to be given the opportunity to do so; or management compensate Grievant for all missed O.T. opportunities.

On October 14, 1999, Supervisor Gonzalez, Respondent's Vice President Ali and the Charging Party met to discuss the grievance. Based upon my observations of the witnesses, I credit Charging Party Russo's description of this grievance meeting. Russo testified that he explained that he wanted the overtime desired list to be opened so that he could get on it,

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that Gonzalez agreed but that Ali objected.

According to Russo, whom I credit, Ali said that management would have to pay Russo for any overtime that he would have missed because he was not on the list. Russo further testified:

> Mr. Gonzalez said, "Is that what you want?" to me, and I said, "Well, if it's going to get it settled, let's settle it, pay me whatever overtime I've missed, let me get on the list and I'll go."

Then, they discussed how much Russo should be paid. However, Ali said "I want you to deny this grievance now and we can send it to step 2." Gonzalez replied, "No, I want to settle it here. Let's go ahead and do it." Ali then replied, "No, I'll just send it up without your signature."

In general, the testimony of Gonzalez corroborates that of Russo, whom I have just quoted. Additionally, following standard procedure, Gonzalez completed a step 1 grievance summary, on which he reported as follows:

> I agreed to let Russo sign the list, then Volome Ali said "We want back pay for any o.t. opportunity missed." I agreed to that. Then Volome said "No he wouldn't agree to that and he would send it up to Step 2."

However, Ali did not send the grievance to step 2. Instead, it languished until well after the government had issued the Complaint in this proceeding. On September 6, 2000, the

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Respondent filed a step 2 grievance appeal. In essence, the appeal contended that the Postal Service had settled the grievance at step 1, but had never paid Russo the overtime which Gonzalez had promised.

In its grievance appeal, the Respondent did not mention that its Vice President, Volome Ali, had turned down the grievance settlement, but the appeal acknowledged that fact indirectly. Respondent's appeal contended that at the first step of the grievance procedure, the union representative did not have authority to reject a settlement offer, and, therefore, the Postal Service had an obligation to go through with the settlement which its Supervisor Gonzalez had proposed.

The Respondent's grievance appeal then demanded that the Postal Service follow through with the settlement which Supervisor Gonzalez had offered. The Postal Service denied the appeal as untimely. The record does not indicate that the grievance has been processed further, and Russo has not received the remedy offered by Gonzalez at the step 1 grievance meeting.

The Complaint does not focus on the Respondent's September 6, 2000 grievance appeal, but rather on the conduct of Respondent's representative at the October 14, 1999 first step grievance meeting. It alleges, in effect, that Respondent's refusal to accept the settlement offered by management at that time, Respondent's insistence on appealing the grievance to step

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2, and Respondent's inaction thereafter constitute an unlawful breach of the union's duty to represent bargaining unit employees fairly.

In examining this issue, I will begin by summarizing the applicable law. Since the Supreme Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), it has been settled that a union owes a duty of fair representation to all employees in the bargaining unit, regardless of whether an employee is a union member.

Perhaps the most obvious instance of a breach of the duty of fair representation occurs when a labor organization fails to process an employee's grievance because the employee is not a member. See, e.g., *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (Ford Motor Co.)*, 325 NLRB No. 90 [530] (March 31, 1998).

The government alleges that discrimination on the basis of nonmembership did take place in the present case. Uncontradicted evidence clearly shows that the Charging Party was not a member of Respondent. However, the record fails to establish that Respondent refused to accept the proposed grievance settlement because Russo was not a member.

Rather, the record indicates that Respondent applied the same rule to Russo that it applied to other employees who were its members. The union opposed any employee's request to be

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placed on the overtime desired list after the deadline had expired.

Therefore, I conclude that the government has failed to prove that Respondent failed or refused to process Russo's grievance because Russo was not a member, as alleged in Complaint paragraph 8.

Complaint paragraph 9 alleges an alternative basis for finding that the Respondent had breached its duty of fair representation, and thereby violated Section 8(b)(1)(A) of the Act. Complaint paragraph 9 alleges that Respondent failed and refused to process the grievance for reasons that were unfair, arbitrary and invidious.

To establish a violation under this theory, the government must prove that the union's action, or inaction, resulted from more than poor judgment or mere negligence. See, e.g., *Rainey Security Agency*, 274 NLRB 269 (1985) and *Diversified Contract Services*, 292 NLRB 603, 605 (1989). As the Board stated in *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984): "Exactly when union conduct constitutes 'something more than mere negligence' is not susceptible to precise definition."

Clearly, the Respondent's decision not to settle the grievance on October 14, 1999, at the step 1 level, was not the result of

negligence. To the contrary, Respondent's Vice President Ali consciously chose to take this position.

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The record does not establish that Respondent's position was unlawfully arbitrary. Respondent's policy, allowing no exceptions to the filing deadline, furthered the union's legitimate interests, such as reducing uncertainty and assuring that all bargaining unit members would be treated equally. By analogy, when a court or government agency requires strict adherence to a filing deadline, that action can hardly be called arbitrary because it treats all parties alike, whereas making exceptions to a deadline could open the door to claims of favoritism and irregularity.

In oral argument, the General Counsel challenged the Respondent's claim that it had such a strict deadline policy for signing the overtime desired list. The General Counsel asserted that if such a hard-and-fast policy existed, it would appear in some kind of written document, but the Respondent had produced no such document. In effect, the General Counsel is characterizing the Respondent's strict deadline policy as an after-the-fact fabrication.

To buttress this lack-of-documentation argument, the General Counsel pointed to a Memorandum of Understanding between the Union and the Postal Service, which appears on pages 303 to 305 of the collective-bargaining agreement. This Memorandum of Understanding required the parties to develop a list of questions and answers regarding the scheduling of overtime.

These questions and answers, agreed upon by both the

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Postal Service and the Union, would constitute an interpretation of the collective-bargaining agreement binding upon the parties. They would be published as part of the contract. Pursuant to the Memorandum of Understanding, the Postal Service and Respondent were to have agreed upon such questions and answers no later than June 1999.

The General Counsel argues, in effect, that if the Respondent had a strict policy of enforcing the deadline, the questions and answers would reflect this policy. Since no document reflecting the questions and answers appears in evidence, I should infer that Respondent really did not have the strict deadline policy which it claimed.

In my view, the General Counsel's argument rests on a faulty assumption. The questions and answers to be negotiated pursuant to the Memorandum of Understanding would not reflect simply the Union's policy, but would be limited to contract interpretations on which both management and the Union agreed. It is not clear that management agreed with such a strict deadline policy and if it did not, then the Union's policy would not appear in the questions and answers.

Indeed, at the step 1 grievance meeting in this case, management was willing to bend the deadline but the Respondent was not. Presumably, the questions and answers already had been negotiated by the time of this Step 1 grievance meeting. The Memorandum of Understanding required the parties to have agreed

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upon the questions and answers by June 1999, and the step 1 grievance meeting was not until October 1999.

Clearly, if the negotiated questions and answers had addressed how strictly the deadline should be enforced, then management and the Respondent would have referred to this interpretation, and presumably abided by it, at the step 1 grievance meeting. Instead, the strictness of the deadline was an unresolved issue.

Considering that management and the Union did not agree on the deadline issue, there is no reason to expect any union policy on this issue to appear in the negotiated questions and answers. Moreover, the Union might well have had a clear policy on this issue without necessarily reducing it to writing. Therefore, I reject the General Counsel's argument that the deadline policy really did not exist because no records reflected it.

The General Counsel has raised an alternative argument which assumes that the Respondent's strict deadline policy really did exist. Specifically, the government pointed to a possible settlement of the grievance which would not violate the Union's strict enforcement of the filing deadline. The General Counsel noted that after the Step 1 grievance meeting, Vice President Ali did not follow up on the possibility that management would pay Russo for overtime he did not work, but nonetheless not put Russo on the Fourth Quarter 1999 overtime desired list.

Supposedly, such a solution could honor the Respondent's strict deadline policy while, at the same time, afford the grievant a remedy. However, on cross-examination, Supervisor Gonzalez testified that he did not offer to pay Russo overtime without putting his name on the list.

Based upon my observations of the witnesses, I conclude that Gonzalez' testimony was reliable.

Moreover, this testimony is consistent with the grievance summary which Gonzalez prepared after the October 14, 1999 meeting. The grievance summary indicates that Gonzalez agreed to let Russo sign the list and also agreed to pay Russo some overtime pay. However, the grievance summary makes no mention of paying Russo backpay without allowing him to sign the list.

Based upon Gonzalez' testimony, which I credit, as well as his written summary, I find that during the October 14, 1999 meeting, Gonzalez never offered to pay Russo some overtime pay without signing the list. Therefore I conclude, contrary to the General Counsel's argument, that Respondent did not act in a perfunctory manner by failing to follow up on such a compromise, because management never offered such a compromise.

When Respondent finally did file the step 2 grievance appeal, on September 6, 2000, it made some statements which strike me as disingenuous. For example, this grievance appeal contends that at the step 1 level, Supervisor Gonzalez and Employee Russo reached an agreement and that the union steward did not have the authority to refuse it. The grievance appeal also implies that Respondent had been

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waiting a long time for management to pay Russo the overtime pay which Gonzalez had promised, and that Respondent filed the grievance appeal because it got tired of waiting.

Thus, the grievance appeal states "the union was patient in waiting to file this grievance to give the employer ample time to process the pay adjustment." Such a statement is contrary to other evidence in the record and I do not take it at face value.

To the contrary, I find that between the time of the step 1 grievance meeting, in October 1999, and filing of the step 2 grievance appeal, in September 2000, the Respondent was not waiting simply to give the Postal Service time to pay Russo the overtime. Instead, I find that after the step 1 grievance meeting, Respondent had no intention of appealing to step 2. It appears very likely that Respondent only filed the step 2 grievance appeal in reaction to the unfair labor practice complaint.

This question remains: Should unlawful motivation be inferred from the Respondent's lack of candor in its step 2 grievance appeal? I believe not.

The Respondent's motivation in taking this transparent evasive maneuver was to avoid liability for its earlier decision not to accept a settlement of Russo's grievance. The obvious motivation for the evasive maneuver says little about the Respondent's earlier motivation for refusing the grievance settlement. At most, the evasive maneuver suggests

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that Respondent had begun to doubt the wisdom of its earlier action.

In sum, I find that the record does not establish that Respondent engaged in conduct which was arbitrary, discriminatory or in bad faith. Additionally, the record does not establish that Respondent took any action with respect to Russo's grievance, or failed to take any action with respect to it, because Russo had not been its member, because Russo had been a member of another labor organization, or because Russo had transferred into the bargaining unit from another bargaining unit. I recommend that the Complaint be dismissed in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.